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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON BROADBENT,

Defendant and Appellant.

A131169

(San Mateo County
Super. Ct. No. SC067385)

Jason Broadbent appeals his conviction, which followed his no contest plea to a violation of Penal Code section 530.5, subdivision (a),¹ using personal identifying information for an unlawful purpose. He argues that his constitutional equal protection rights require the retroactive application of section 4019, as amended in October 2011, to award him additional conduct credits, despite its stated prospective application. He also argues we must reverse and remand for resentencing because he was sentenced based on a materially inaccurate characterization of the facts underlying his prior “strike” conviction, in violation of his federal due process rights or, in the alternative, that he received ineffective assistance of counsel. We affirm the judgment.

BACKGROUND

In November 2008, the San Mateo County District Attorney charged defendant with eight counts related to his alleged misuse of a stolen credit card to purchase items from a local Sears store. The prosecution further alleged defendant had nine prior felony

¹ All statutory references are to the Penal Code unless otherwise indicated.

convictions rendering him ineligible for probation under section 1203, subdivision (e)(4), and that he had two prior strike convictions within the meaning of section 1170.12, subdivision (c)(2).

According to the transcript of the preliminary hearing held to determine probable cause, defendant's neighbor was issued a credit card from Sears. The neighbor never activated the account and had not seen the card after his house was burglarized in May of 2008. On May 18, 2008, four transactions, for goods costing a total of more than \$4,000, were made with this card at the electronics department of a Sears store in San Bruno. The first three transactions were recorded on the store's video surveillance system.

Defendant was subsequently questioned by police. After being confronted with the video footage, he admitted making one of the four purchases. He said he was given the card by an acquaintance because of a debt he was owed.

After being charged, defendant, among other things, moved to strike certain "prior" allegations, including the allegation of the prior strike in 1993. Defendant attached as an exhibit to that motion a reporter's transcript from the 1993 case, which indicates the prosecutor in 1993 stipulated defendant had shot the victim 11 times with a firearm, "mostly in the legs and arms" and once in the chest. The People subsequently conceded that certain priors should be stricken and filed an amended information, which still included the 1993 prior strike.

Defendant subsequently pled no contest to a single count of section 530.5, subdivision (a), a felony, and admitted one prior strike from 1993 for a violation of section 245, subdivision (a)(2). The court in the present case accepted defendant's plea, and found him guilty of the count and the prior strike allegation to be true.

Prior to sentencing in January 2011, defendant's trial counsel moved under section 1385, subsection (a) and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 for dismissal of this prior strike conviction in the interests of justice and for a grant of probation (*Romero* motion). Also, a probation department report was prepared, which states, among other things, that "[a] Sacramento police report reveals that the defendant

shot a subject in the back 13 times with a nine millimeter handgun over a dispute concerning narcotics sales.”

At the hearing on defendant’s *Romero* motion and sentencing, the prosecutor stated that “the [1993] incident did include the defendant shooting 13 times into the back of an individual concerning a dispute over a drug sale.” The prosecutor continued: “[I]t seems clear that that was in fact an attempted murder . . . that is a clear attempt in the People’s eyes today to take somebody’s life with a handgun.” The defense counsel objected to “relitigating the prior. The prior is what it is.”

The trial court responded that it was “important what the underlying facts of that offense are just as . . . equally important as to what the defendant was actually convicted of. I am just making—[the prosecutor] is just making a reasonable argument to some extent, but I’m not accepting that it was an attempted murder because that isn’t what he was convicted of. It doesn’t change the violent nature of that offense.”

The court then discussed its reasoning regarding defendant’s *Romero* motion. It referred to a number of considerations, including that the current crime was one of “greed,” that defendant showed very little recognition of the illegality and wrongful nature of what he did, and that his participation with the probation department was “abysmal.” The court then turned to defendant’s prior criminal history. It referred to the 1993 prior strike conviction, two parole violations in 2000 and 2002, a 1987 conviction and commitment to the Department of Corrections after being placed on probation, and four parole violations. The court also stated, “Your record is replete with crimes of violence,” and referred to a 1988 felony conviction stemming from an allegation initially of robbery, a misdemeanor domestic violence conviction in 1990, a misdemeanor conviction for criminal threats in 1992, and the conviction “where you shot a subject in the back 13 times.”

The court concluded that the defendant was “an individual who has demonstrated [him]self to be violent and to be a danger to the community at large,” who the court could not say “falls outside the parameters of the strikes legislation.” It also found defendant’s “character . . . is adequately demonstrated through not only your criminal history but your

interaction with the probation department in this case.” While the court did not doubt defendant loved his family and could find gainful employment, it was unconvinced that defendant would not continue “to engage in criminal behavior and victimize the community as I don’t think you have adequately demonstrated that you are someone who has been rehabilitated.” Therefore, the court denied defendant’s *Romero* motion.

The court then sentenced defendant to 16 months in state prison for his felony conviction and doubled this, for a total sentence of 32 months, based on the prior strike conviction in 1993. Defendant was awarded seven days credits for time served and two days of conduct credit.

Following sentencing, defendant filed a timely notice of appeal. By order dated November 7, 2011, we granted defendant’s application to strike a previously filed *Wende* brief (*People v. Wende* (1979) 25 Cal.3d 436) and to file in its place appellant’s opening brief.

DISCUSSION

I. Presentence Conduct Credits

Defendant argues his federal and state constitutional equal protection rights mandate that section 4019, as recently amended to prospectively make defendants convicted of prior violent felonies eligible for day-for-day conduct credits, be applied to him retroactively, entitling him to six days of conduct credits. We agree with the People that there is a rational basis for the challenged classification here.² Therefore, we reject defendant’s claim.

At the time defendant was sentenced in January 2011, he was ineligible for day-for-day conduct credits because he had been previously convicted of a serious or violent felony. (Former §§ 2933 and 4019 [Stats. 2010, ch. 426, §§ 1, 2].) Sections 4019 and 2933 were amended, operative October 1, 2011 (Stats. 2011, ch. 15, § 482, Stats. 2011,

² We assume for the sake of argument, without deciding the matter, that the defendant is similarly situated with those who serve time after the effective date of the October 1 amendment of section 4019. Therefore, we do not further address the parties’ arguments about this issue.

ch. 39, § 53 [regarding section 4019]; Stats. 2011-2012, 1st Ex. Sess., ch. 12, §§ 16, 35.) As a result of the October 2011 amendments, section 4019 enables defendants with prior serious or violent felony convictions to obtain conduct credits previously unavailable to them, but applies only to defendants whose crimes were “committed on or after October 1, 2011,” thereby excluding defendant. (§ 4019, subd. (h).)

Both the federal and state Constitutions guarantee the equal protection of laws to all persons. (U.S. Const., 14th Amend., § 1; Cal. Const., art. I, § 7.) We agree with the parties that the distinction at issue neither “touch[es] on fundamental interests,” nor involves a “suspect classification.” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*).) Accordingly, a classification made between two similarly situated groups will be upheld if it “bears a rational relationship to a legitimate state purpose.” (*Ibid.*)

As our Supreme Court has stated, “ ‘ ‘ ‘a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.* [Citations.] Where there are “plausible reasons” for [the classification], “our inquiry is at an end.” ’ ’ ’ ” (*Hofsheier, supra*, 37 Cal.4th at pp. 1200-1201.) “ ‘Those attacking the rationality of the legislative classification have the burden “to negative every conceivable basis which might support it,” ’ ” stressing that the basis for that rationale must be “*reasonably* conceivable.” (*Id.* at p. 1201.)

Defendant contends that the express purpose of the October 2011 amendments was, as reflected in the legislative history, to address “the fiscal emergency” declared by the Governor. (Stats. 2011, ch.15, (17); Stats. 2011-2012, 1st Ex. Sess., ch. 12, (19).) Given this purpose, defendant argues, “there is no ‘legitimate public purpose’ for denying additional conduct credit to those prison inmates who committed a crime before October 1, 2011 and established their entitlement to conduct credit.”

Defendant’s argument fails for a reason not addressed by the parties, but which is provided by a case cited by both: a purpose may be sufficient to uphold a classification regardless of whether it is the actual or expressly stated legislative purpose. (*Hofsheier*,

supra, 37 Cal.4th at p. 1201.) “[I]t is irrelevant whether the perceived reason for the challenged distinction actually motivated the Legislature.” (*Ibid.*) A proffered reason is sufficient if it “ ‘conceivably or “may reasonably have been the purpose and policy” of the relevant governmental decisionmaker,’ ” and “ ‘the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.’ ” (*Ibid.*) The inquiry is “whether ‘ “the statutory classifications are rationally related to the ‘realistically conceivable legislative purpose[s]’ . . . and . . . by declining to “invent[] fictitious purposes that could not have been within the contemplation of the Legislature” ’ ” (*Ibid.*)

We conclude that it is reasonably conceivable that, as the People contend, “the [l]egislative intent in increasing the conduct credits award to inmates was, at least in part, an effort to further encourage compliance with the rules and regulations of the facility and the inmates’ participation in work.”³ (See *People v. Brown* (2004) 33 Cal.4th 382, 405 [“ ‘section 4019[] focuses primarily on encouraging minimal cooperation and good behavior by persons temporarily detained in local custody’ ”].) This purpose provides a rational basis for the challenged classification.

On this point, the People rely on *In re Stinnette* (1979) 94 Cal.App.3d 800 (*Stinnette*). *Stinnette* involved a similar equal protection challenge to the prospective only application of the Determinate Sentencing Act (§ 1170 et seq.), which allowed persons to earn credit for good conduct while incarcerated in state prison. (*Stinnette*, at pp. 803-804.) This is analogous to the good conduct credit earned pursuant to section 4019. The *Stinnette* court found that the Legislature had the legitimate purpose “of motivating good conduct among prisoners so as to maintain discipline and minimize

³ The People assert that the Legislature’s *actual* purpose in amending section 4019 in October 2011 included, at least in part, incentivizing good behavior from jail inmates, since this is an underlying purpose of the statute and can be incorporated as part of the legislative purpose for its amendment. (See *People v. Yartz* (2005) 37 Cal.4th 529, 538 [the Legislature is deemed to have amended a statute aware of statutes and judicial decisions already in existence].) As we have indicated, we need not determine the Legislature’s actual purpose to determine the issue before us.

threats to prison security.” (*Id.* at p. 806.) As such, a prisoner whose judgment has become final is not entitled to the benefit of the new amendment because “[r]eason dictates that it is impossible to influence behavior after it has occurred.” (*Ibid.*; see also *In re Strick* (1983) 148 Cal.App.3d 906, 913 (*Strick*) [the “incentive purpose has no meaning if an inmate is unaware of it”].) This same reasoning applies in the present case.

Defendant argues that we should not rely on the reasoning that good conduct cannot be encouraged retroactively, such as that discussed in *Strick, supra*, 148 Cal.App.3d at pages 912-913. He argues *Strick* was wrongly decided, is distinguishable from the present case, and that its “thesis” was refuted by our Supreme Court in *People v. Sage* (1980) 26 Cal.3d 498. However, *Sage*, not *Strick*, is inapposite. *Sage* focused on the dissimilar application of good conduct credits between pretrial detainee felons on the one hand and pretrial detainee misdemeanants and felons who served no presentence time on the other. (*Sage*, at pp. 507-508.) The court found there was no rational basis for denying presentence conduct credit to detainee felons. (*Id.* at p. 508.) This dissimilar treatment of different classes of prisoners is not relevant to the present circumstances. *Strick*, on the other hand, involved the rejection of an equal protection challenge to the prospective only application of statutory changes designed to incentivize productive work and good conduct among prison inmates. (*Strick, supra*, at pp. 912-913.) This is analogous to the present circumstances.

In re Kapperman (1974) 11 Cal.3d 542 (*Kapperman*), on which defendant also relies, does not dictate a contrary conclusion. *Kapperman* involved an equal protection challenge to legislation that granted credit for actual time spent in presentence custody on a prospective basis only. (*Id.* at pp. 544-545.) The *Kapperman* court found no rational basis for this prospective only application and retroactively extended the credit. (*Id.* at p. 545.) *Kapperman* is inapposite because it involved actual custody credit, not conduct credit. The *Kapperman* court itself distinguished between actual custody credit—what was at issue in *Kapperman*—and “‘good-time’ credit awarded as a bonus for good conduct and efficient performance of duty while in prison.” (*Kapperman*, at p. 548.) The distinction makes sense. Conduct credits must be earned, whereas presentence custody

credits are awarded automatically, based on the time served prior to sentencing. The two types of credit differ in purpose as well. The purpose of conduct credits is to incentivize good conduct; custody credits offer no corresponding motivation.

In short, the prospective only application of the October 2011 amendment to section 4019 is rationally related to the purpose of incentivizing good conduct among prisoners, which cannot be incentivized retroactively. Accordingly, defendant's equal protection claim is without merit.⁴

II. Representations About Defendant's Prior Strike Offense

Defendant argues that his federal due process rights were violated when the court relied on the prosecutor's purported "false information" concerning the facts of defendant's prior strike offense in 1993 at sentencing to deny defendant's *Romero* motion, necessitating a remand for resentencing. He also argues the trial court abused its sentencing discretion, contending the court's factual errors "surely" qualify as impermissible sentencing factors under state law, and that the prosecutor violated defendant's federal due process rights by relying on information the prosecutor should have known was false. The People disagree on the merits, and also argue, albeit summarily, that forfeiture is appropriate here for lack of an appropriate objection below. We find forfeiture and, therefore, do not determine the merits of defendant's claims, other than to note that in any event, we would at the very least find harmless error in the absence of forfeiture.

A. Forfeiture

We agree with the People that forfeiture is appropriate here for lack of an appropriate objection to the purported mischaracterization of facts at the sentencing hearing below. Our own research indicates, "[i]n order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims,

⁴ Our reasoning and conclusion are consistent with that of our colleagues in Division One of this court in *People v. Borg* (April 2, 2012, A129258) ___ Cal.App.4th ___ [2012 Cal.App. LEXIS 450], who rejected a very similar argument that the prospective only application of conduct credits pursuant to section 4019, as operative on October 1, 2011, violated the defendant's equal protection rights.

reviewing courts have *required* parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim.” (*People v. Scott* (1994) 9 Cal.4th 331, 351 [a defendant’s failure to object forfeits claims of error in the exercise of sentencing discretion and statement of reasons required by statute and rule]; see also *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1068 [this court applying the “general waiver rules” of *Scott* and *People v. Welch* (1993) 5 Cal.4th 228 to a defendant’s failure to object at sentencing to noncompliance with statutory probation fee procedures].) “[C]laims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.” (*Scott, supra*, at p. 354.)

Defendant urges that, despite the lack of an objection below, we should consider the appeal pursuant to *People v. Sherrick* (1993) 19 Cal.App.4th 657, 660-661 (prosecutor, as “ ‘guardian of the defendant’s constitutional rights,’ ” “should seek to correct an erroneous impression of the defendant’s legal status”), and exercise our discretionary review authority to reach the merits of his claims. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn.7 “[t]he appellate courts typically have engaged in discretionary review only when a forfeited claim involves an important issue of constitutional law or a substantive right”]; *People v. Morrison* (2004) 34 Cal.4th 698, 717 [despite absence of objection, court considered and rejected claim alleging prosecutor knowingly presented false testimony].)

Defendant’s argument is unpersuasive. Although the issue is not argued by the People, we note that defendant does not necessarily establish that the prosecutor committed error. The prosecutor’s and the court’s remarks were supported by the probation department report, which states that “[a] Sacramento police report reveals that the defendant shot a subject in the back 13 times with a nine millimeter handgun over a dispute concerning narcotics sales.” The record does not indicate that this report incorrectly summarized a police report, and defendant does not explain why the prosecutor could rely on it, if the prosecutor did, at the sentencing hearing.

The probation department report does differ with the 1993 statement in court by the prosecutor in the prior strike case, offered then as a factual basis for defendant's no contest plea, that defendant shot the victim 11 times with a firearm "mostly in the legs and arms" and once in the chest. However, these discrepancies are very minor under the circumstances, particularly in light of the court's emphasis on the "violent nature" of the facts underlying the prior strike conviction, not the exact number of times or where on the body the victim was shot, as well as the numerous other matters considered by the court in rejecting defendant's *Romero* motion. Furthermore, if the prosecutor or court made any mistake, it was, as defendant himself puts it, "surely due to an honest mistake" by the prosecutor. In short, defendant does not establish his claim is a matter that requires our review, or that we should exercise our discretion to review, in the absence of an appropriate objection below. We decline to do so.

Even if we were to address the merits and assuming for the sake of argument errors occurred, we would at the very least conclude any errors were harmless under either of the standards asserted by defendant, they being the harmless-beyond-a-reasonable-doubt standard articulated in *California v. Chapman* (1967) 386 U.S. 18, 24 (for the court's purported error) and the any-reasonable-likelihood-of-error-affecting-the-judgment standard stated in *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1386-1387 (for the prosecutor's purported use of false information). The trial court denied defendant's *Romero* motion for a number of reasons besides the facts underlying the prior strike offense, including because defendant had other prior convictions related to crimes of violence and had participated in an "abysmal" way with the probation department.

Regarding the prior strike offense itself, the court's statements at the hearing emphasized the violent nature of the crime and did not, contrary to defendant's suggestion, rely on any mistaken contentions by the prosecutor indicating the crime was tantamount to attempted murder. We do not see, and defendant has not sufficiently explained, why the court would have concluded anything other than the prior strike offense was of a violent nature if it had been established that defendant shot the victim 11 times, mostly in the limbs and once in the chest, rather than in the back 13 times. Under

either characterization, the violent nature of the offense is readily apparent. We have no doubt any error was harmless.

B. *Ineffective Assistance of Counsel Claim*

In the alternative, defendant argues he was provided ineffective assistance of counsel because his trial counsel did not object when the prosecutor falsely characterized the facts of his prior strike conviction. He argues his trial counsel's performance was deficient because a reasonably competent attorney would have brought this purported error to the court's attention, citing *People v. Cotton* (1991) 230 Cal.App.3d 1072, 1084-1085 ("[w]henver a sentence is enhanced or probation is revoked due to a prior conviction, it is counsel's obligation to examine the validity of the prior or underlying conviction"). The People argue that defendant cannot establish prejudice and, therefore, his claim must fail. We agree with the People.

“ ‘To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that this deficient performance caused prejudice in the sense that it “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” [Citations.] If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient.’ ” (*People v. Sapp* (2003) 31 Cal.4th 240, 263 (*Sapp*); *Strickland v. Washington* (1984) 466 U.S. 668.)

“In determining whether an attorney's conduct so affected the reliability of the trial as to undermine confidence that it ‘produced a just result’ [citation], we consider whether ‘but for’ counsel's purportedly deficient performance ‘there is a reasonable probability the result of the proceeding would have been different. [Citations.]’ ” (*Sapp, supra*, 31 Cal.4th at p. 263.)

For the same reasons stated in our harmless error discussion in subpart A, *ante*, we conclude there is no reasonable probability that that the trial court would have ruled differently regarding defendant's *Romero* motion or sentence but for defense counsel's

lack of objection to the purported factual errors stated by the prosecutor and the court regarding defendant's prior strike conviction. Accordingly, defendant was not denied effective assistance of counsel.

DISPOSITION

The judgment is affirmed.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.